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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 9

THE SCHRIBER-SCHROTH COMPANY,

vs. *Petitioner,*

THE CLEVELAND TRUST COMPANY,
CHRYSLER CORPORATION,

Respondents.

No. 10

THE ABERDEEN MOTOR SUPPLY COMPANY,

vs. *Petitioner,*

THE CLEVELAND TRUST COMPANY,
CHRYSLER CORPORATION,

Respondents.

No. 11

THE F. E. ROWE SALES COMPANY,

vs. *Petitioner,*

THE CLEVELAND TRUST COMPANY,
CHRYSLER CORPORATION,

Respondents.

AFFIDAVIT OF JOHN H. SUTHERLAND IN REPLY TO AFFIDAVIT OF WILLIAM C. McCOY APPENDED TO RESPONDENTS' MEMORANDUM OPPOSING PETITIONERS' APPLICATION FOR A WRIT OF CERTIORARI TO CORRECT DIMINUTION OF THE RECORD.

JOHN H. SUTHERLAND,
Counsel for Petitioners.

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STATE OF MISSOURI,
City of St. Louis, ss:

JOHN H. SUTHERLAND, being duly sworn, deposes and says that he is of counsel for petitioners; that he has read the

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affidavit appended to RESPONDENTS' MEMORANDUM OPPOSING PETITIONERS' APPLICATION FOR A WRIT OF CERTIORARI TO CORRECT DIMINUTION OF THE RECORD; that he recalls having a conference on or about February 21, 1935, with William C. McCoy for the purpose of settling the record for the Court of Appeals in these cases: but does not recall having specifically discussed Exhibit BB at such conference, as stated in the affidavit of William C. McCoy.

Affiant did not "propose" at such conference that Exhibit BB be included in the record, but on the contrary affiant proposed the inclusion of such Exhibit BB in a letter dated December 10, 1934, photostatic copy of affiant's file copy of which is attached hereto; that in a letter dated December 24, 1934, photostatic copy of which is attached, respondents' counsel, William C. McCoy, specifically acquiesced in the request that Exhibit BB be included (see page 2 of said letter). Finally in a letter dated February 25, 1935, respondents' counsel advised petitioner's counsel, as shown by the photostatic copy attached hereto, that "we have redrawn the Praecipe to include all of the exhibits that you insist upon including in the Record, with the exception of the assignments of the patents in suit"; and further "We are also including the many defendant's exhibits that you desire to have incorporated in the Praecipe"; and further "We are doing our best to meet all of your requirements in preparation of this Praecipe and have met all of them except as to the assignments."

Affiant believes that if Exhibit BB had been discussed at the conference on February 21, 1935, and excluded as a result thereof, the portion of the record (pages 671-2), having reference to such exhibit, would have been deleted at the same time.

JOHN H. SUTHERLAND,
Counsel for Petitioners.

Sworn to and subscribed before me this 15th day of October, 1940.

HELEN S. BOHNE,
Notary Public.

[SEAL.]

My Commission expires Nov. 25, 1942.

Receipt of a copy of the foregoing affidavit and copies of the letters attached acknowledged this 16th day of October.

WM. C. McCOY,
Counsel for Respondents.

December 10, 1934.

Mr. Wm. C. McCoy,
Evans & McCoy,
Bulkley Building,
Cleveland, Ohio.

Re: The Cleveland Trust Cases.

Dear Mr. McCoy:

I enclose herewith list of further corrections or revisions in your Narrative Statement of Testimony.

I have also considered your praecipe, as well as your proposed order for withdrawal of physical exhibits.

In addition to those exhibits which are mentioned in the praecipe to form a part of the record, the following should also be included:

Plaintiffs' Exhibits:

2-A, 2-B, 3-A, 3-B, 3-C, 3-D, 4-A, 4-B, 4-C, 4-D, 5-A, 5-B, 5-C, 5-D, 5-E, 6-A, 6-B, 6-C, 23, 25, 26, 29, 33, 35-A to E, inclusive, 38-a to e inclusive, 39-a to e inclusive, 40, *44, *45 and 62.

Defendants' Exhibits:

A, B, C, D, J, K, L, M, O, S, T-1, T-2, T-3, U, W, Y, BB, CC, DD, EE, FF, GG, HH, II, JJ, KK, LL, MM, 3-L, 3-S, 3-U, 4-B, 4-G, 4-I (drawing No. 438 only required), 4-J, 4-K, 4-L-2, 4-L-3, 4-L-4, 4-M, 4-N, 4-O, 4-R, 4-Y, 4-Z, 5-A, 5-B,

5-C, 5-D, 5-E, 5-F-1, 5-F-3 to 12 inclusive, 5-G, 5-H-1, 5-H-2, 5-H-3, Bill of Complaint in Simmons Case No. 3510 (Rec. p. 1015), 5-K-1 to 9 inclusive, 11 and 12, 5-M.

With reference to your Exhibits 43 and 46, I would suggest that instead of making 46 a physical exhibit and 43 a documentary exhibit, that 46 be made the documentary because my recollection is that it is clearer than the photostat 43.

This leaves the following to go up as physical exhibits:

Plaintiffs' Exhibits:

1, 8, 9, 10-A, 12, 14, 17, 20, 24, 30, 31, 34, 47, 48, 49, 58, 59, 60, 61, 71-A and B, 72-A and B, 73, 76, 79, 80, 81, 82, 83.

Defendants' Exhibits:

B, E, F, G, H, I, J-1, N, P, P-1, P-2, Q, R, V-1 to V-7 inclusive, X, AA, GG-1, HH-1, II-1, II-2, JJ-1, NN, AAA, BBB, CCC, EEE, FFF, 3-G, 3-H, 3-I, 3-J, 3-K, 3-M, 3-N, 3-O, 3-P, 3-Q, 3-T, 3-V, 3-W, 5-I, 5-J, 5-L.

With reference to the above mentioned physical exhibits, I think it preferable to incorporate in the praecipe, a request to the Clerk that they be withdrawn from the files of the District Court and transmitted to the Clerk of the Court of Appeals. This will save both sides the trouble of obtaining the exhibits from the Clerk, checking them back and forth and finally packing them for shipment to the Court of Appeals. I think it is the usual practice to let the Clerk of the District Court do all this, and I believe you will agree that that is the best way to handle it in this case. Of course, an order of the District Court permitting the exhibits to be withdrawn from its files for that purpose is essential.

I believe this leaves only Exhibits 10, 18, 19, 27 and 27-A which will not be needed in the Court of Appeals. If you care to redraft the order which you have sent me, embodying the above suggestions, I will be glad to approve it.

I notice in your order for withdrawal of the exhibits, you have included Exhibits 1-Z and 2-Z. My recollection is that these were numbers which were applied to the Gulick records during the taking of depositions. They were marked only for identification and were not admitted in evidence as such. I note also you included Exhibit 67-A as a physi-

cal exhibit, but you will probably recall that that was not received in evidence.

Contrary to your expressed wish, I have had to include the various assignments, license agreements, etc. If the Court of Appeals for the Sixth Circuit will accept, as the Court of Appeals for the Eighth Circuit does, a reduced number of record copies of documentary exhibits, I will be glad to cooperate with you in order to effect as much saving in the cost of this record as is possible. For instance, in the case of file wrappers, the Court of Appeals in this Circuit, will, upon application, grant leave to reproduce them in either five or seven copies rather than the required thirty. If the Court of Appeals for the Sixth Circuit will do this, it will be agreeable to us, as concerns the assignments, license agreements, trust agreements, file wrappers, the various bills of complaint and opinions of the tribunals in the interferences, and, in fact, any of the documentary exhibits (except the patents and publications) which comprise more than two or three pages.

I am sending Mr. Kent a stipulation extending the time for the filing of the praecipe and the lodgment of the narrative one week, in accordance with your letter. He will probably submit this stipulation to you for signature within the next few days and will then file it with the Court. I appreciate your courtesy in allowing us this additional time, and, I am sure, Mr. Bruninga will also.

Yours very truly,

3/A

December 24, 1934.

Mr. J. H. Bruninga,
2119 Railway Exchange Place,
St. Louis, Mo.

Dear Mr. Bruninga,

I have a letter from Mr. Sutherland, dated December 10, 1934, in which I understand that he desires duplication of a great many additional exhibits of both plaintiff and defendant in the printed or supplemental record. Be-

cause of the uncertainty of much of this, I am writing you for further information on it.

The first series of Plaintiff's exhibits, 2-A to 6-C, inclusive, and Exhibit 26, and Defendant's Exhibits 3-U, 5-A and 5-B, are the assignments of the patents in suit and letters and papers dealing with the title of Maynard. The matter of title was completely disposed of by the Master's findings of fact Nos. 2, 9 and 10, together with the conclusions of law Nos. 2, 3, 4, 5 and 9. Furthermore, no holdings were based on the prosecution history of any of the patents in suit except Gulick and Mooers. This makes Exhibits 4L$_2$ to 4L$_4$ superfluous. No exceptions were taken to any of these findings or conclusions and therefore it is not seen wherein any of the assignments, agreements, trust papers or file wrappers (except Gulick and Mooers) are pertinent to the matters raised on the appeal.

Equity Rule 75, paragraph b, provides as to the *evidence* to be included in the record that

> "* * * all parts not essential to the decision of the *questions presented by the appeal* being omitted * * *"

and of course the only matters taken up on appeal are those covered by the exceptions and the writ of errors. Each of the matters that we regard as not essential to matters raised on appeal are marked "*". This was our reason for omitting these exhibits from the printed record.

Plaintiff's Exhibit 23, which you desire to have duplicated, is an enlarged display photostat of the Ray Day piston structure. This obviously is a physical exhibit for use on the easel in the court and should not be duplicated in the printed record.

Since there is no question, apparently, as to the character of piston that was reduced to practice by Gulick in 1911 and again in 1914, and since there is no exception to the evidence as to the structure of these pistons, it would appear unnecessary to duplicate the Randall recollection of the Gulick piston Exhibit 29, Winchester's sketches Exhibits 35a to e inclusive, Exhibit *44, which is a substantial duplication of Exhibit 36, reproduced, or Exhibit

45, which is a blueprint of the standard Excelsior 1911 iron piston.

We already have in evidence Exhibit 51, which has been referred to by both of us as the 1914 type of piston, and therefore it seems unnecessary to reproduce Exhibit 62, which is the corresponding drawing of this 1914 aluminum piston that was before the Patent Office as an exhibit there.

There is no Exhibit 33 in evidence, since this sketch was originally marked for identification as Exhibit 33 (R. 1060) but it was later offered in evidence as Exhibit 62 at page 1478 of the record.

Add the following to the printed record:

Gulick Sketch, Plaintiff's Exhibit 62
Sketches of Long piston made from photostats in court, Defendant's Exhibits A, O, W and Y
Franklin Bulletins, Defendant's Exhibits C, D, H, I and N
Gilbert Casting Cards, Defendant's Exhibits GG to MM, inclusive
Piston Publications, Defendant's Exhibits M. U. 3S, 4G, 4J, 4K, 4M, 4N, 4O, 5C, 5D, 5E and 5M
Silv-O-Lite Circular, Defendant's Exhibit 3-L
Root's superposed on Ebbs, Defendant's Exhibit 4B
Franklin Drawing, Defendant's Exhibit BB
Aluminum Castings Company Drawings, Defendant's Exhibit CC
Royalty Sketches, Defendant's Exhibits DD, EE and FF
Staver Certificate, Defendant's Exhibit 5-G
Chadwick and Franklin Drawings of Long Piston, Defendant's Exhibits S, T_1, T_2, T_3, BB and CC

The following exhibits to be duplicated in typewriter, so far as written matter is concerned, and by photostat where drawings appear—(Eight copies or what court orders):

Assignments, Plaintiff's Exhibits 2-A to 6-C, inclusive
The Trust Agreements, Plaintiff's Exhibits 26, 77 & 78

The License Agreements, Defendant's Exhibits 4S, 4T, 4U and 4V (Same as Plaintiff's Exhibits 38A to E, 39A to E and 40, so far as 4-T, 4U and 4V are concerned)

* The Chrysler correspondence, etc. Defendant's Exhibits 3U, 5A and 5B

The Royalty Report, Defendant's Exhibit 4-I

* The File Wrappers $4L_2$ to $4L_4$, inclusive

The Venner application, working drawing, correspondence, etc. Defendant's Exhibits J, K & L

The Bill of Complaint and Answer in Simmons Suit, Plaintiff's Exhibit 25 and Defendant's Exhibit — R. p. 1015

Bill and Answer in Cleveland Trust *vs.* National, Defendant's Exhibit 4-Y

Bill and Answer in Cleveland Trust *v.* Long, Defendant's Exhibit 4-Z

* Papers regarding Chrysler activity in suit, Defendant's Exhibits 3-V, 5-A and 5-B

Weems Agreement, Defendant's Exhibit X

Publications re Monckmeier races, Defendant's Exhibits 4-R, $5\text{-}F_1$ to $5\text{-}F_{12}$, inclusive

Schoengarth Application Matters, $5\text{-}K_1$ to $5\text{-}K_{12}$, inclusive, except $5\text{-}K_{10}$

Hartog *v.* Pomeroy Interference Matters, Defendant's Exhibit $5\text{-}H_1$ to $5\text{-}H_3$, inclusive

Randall Sketch of Gulick Piston, Plaintiff's Exhibit 29

Winchester Sketch of Gulick Piston, Plaintiff's Exhibits 35a to e, inclusive

Gulick Sketch, Plaintiff's Exhibit *44

Excelsior Motor Iron Piston, Plaintiff's Exhibit *45

Because of Rule 75, paragraph b, we may feel required to omit those exhibits that are starred above from our praecipe, for our own protection, although we would not vigorously oppose your effort to include them, preferring to get some ruling by the Court as to their materiality, for our own protection. This will not be decided, however, until I have a chance to talk it over with Mr. Richey.

If you wish to make any shift between the printed and photostat portions of the record as outlined above, please

let me know at once, so that I may make up the revised Praecipe.

Very truly yours,

WM. C. McCOY.

WCM/LR.
c/c to Mr. F. O. Richey

February 25, 1935.

Mr. J. H. Bruninga,
2119 Railway Exchange Bldg.,
St. Louis, Mo.

Re: Piston Suits—Praecipe.

Dear Mr. Bruninga:

As the result of our interview with Mr. Sutherland on Thursday, February 21st, we have redrawn the Praecipe to include all of the exhibits that you insist upon including in the Record, with the exception of the assignments of the patents in suit. A copy of the revised Praecipe is enclosed. It seems to us that this title matter is closed, so far as title in the Plaintiff, the right to own these patents, and the right to sue under them is concerned. Please reconsider this question of including the assignments.

We are also including the many Defendant's exhibits that you desire to have incorporated in the Praecipe. I believe that these are correct, with the exception of Exhibit 5-I, which Mr. Sutherland thought could be reduced considerably by selection of the important pages.

We are doing our best to meet all of your requirements in preparation of this Praecipe and have met all of them except as to the assignments, and therefore we would like to have from you, at an early date, advice on the following matters:

1. As to whether you will approve the Praecipe without the assignments; and

2. Whether you require all of Defendant's Exhibits 5-I.

We are also enclosing a copy of a proposed stipulation that was sent to you some time ago but upon which we

have had no reply. It is believed that you are in accord with us on the proposition of consolidating the Record into one printed transcript. If there is any objection to this stipulation please advise us at once.

Very truly yours,

WM. C. McCOY.

WCM/LR
Encl.
c/c to Mr. B. M. Kent.

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